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Supreme Court, U.S.
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No. 01-900

In the

Supreme Court of the United States

ROBERTA BUGENIG,

Petitioner,

v.

HOOPA VALLEY TRIBE; THE HOOPA VALLEY TRIBAL COUNCIL; THE TRIBAL COURT OF THE HOOPA VALLEY TRIBAL RESERVATION; BYRON NELSON, JR., Honorable Judge of the Hoopa Valley Tribal Court; MERV GEORGE, Chairman of the Hoopa Valley Tribal Council,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONER'S REPLY TO THE OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

The danger inherent in the Ninth Circuit's decision extends far beyond the boundaries of Mrs. Bugenig's property and the Hoopa Valley Indian Reservation. As a dozen states and citizens from an equal number of states (and reservations) plainly recognize, the Ninth Circuit's divination of a delegation of plenary tribal authority over nonmember fee property is troubling. It is troubling because there is not a word in the plain language of the Hoopa-Yurok Settlement Act that hints at such a delegation. It is troubling because Congress' "ratification and confirmation" of a tribal constitution that is itself ambiguous when it comes to the question of delegation, falls far short of the requirement for an "express congressional delegation." And, as Mrs. Bugenig explained in her petition, it is troubling because it is unclear that Congress even had the power to delegate to the Tribe the authority to engage in local land use regulation, religiously motivated or otherwise. Respondents' attempt to belittle Mrs. Bugenig and the constitutional infirmities represented by the decision does nothing to diminish the need for this Court to grant the petition in order to explain the manner of and extent to which Congress can delegate regulatory authority to a tribal entity over nonmember fee land.[1]

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[1] While Respondents state that Mrs. Bugenig "exaggerates" the scope of the decision below, Respondents' Brief in Opposition (Opp.) at 5, it should be noted that there are many individuals in a similar predicament who could be affected by assertions of tribal authority over nonmember fee land. Significantly, of the 808,070 people living within the boundaries of Indian reservations, 370,543, or 45.8%, are non-Indians. Bureau of the Census, U.S. Dep't of Commerce, *1990 Census of Population, Social and Economic Characteristics, American Indian and Alaska Native Areas* 3 (1990).

I

NEITHER THE LANGUAGE OF THE SETTLEMENT ACT, THE TRIBAL CONSTITUTION, NOR THE LEGISLATIVE HISTORY CONTAIN AN EXPRESS AND UNAMBIGUOUS DELEGATION

Respondents would like to forget the strong presumption against the existence of tribal jurisdiction over nonmember fee property. In suggesting that the finding of a congressional delegation here would not "flout[] some presumption of a lack of authority over nonmembers on reservation land," Opp. at 14, Respondents belie their unwillingness to accept this Court's repeated exhortations that the "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations . . . cannot survive without ***express*** congressional delegation." *Montana v. United States*, 450 U.S. 544, 564 (1981) (emphasis added). With respect to there being "some presumption," this Court said just last year that "the absence of tribal ownership has been virtually conclusive of the absence of tribal civil jurisdiction." *Nevada v. Hicks*, 121 S. Ct. 2304, 2310 (2001).

While both the Ninth Circuit and the Tribe suggest that Congress expressly granted regulatory authority over nonmember fee land to Respondent Tribe with the Settlement Act, neither contend that anything on the ***face*** of the Act expressly grants such authority. The court below averred that the Act must be "[r]ead [t]ogether with the Tribal Constitution." Appendix in Petition for Writ of Certiorari (Pet. App.) at A-24. Alternatively, the court suggests that "the events surrounding the enactment of the Settlement Act show that Congress understood the scope of its delegation." Pet. App. at A-25. Respondent Tribe takes a similar tack. While not arguing that the Settlement Act by itself delegates federal authority, Respondent suggests that the "ratify and confirm language" of

the Act "is to give every clause in the document being ratified the express authorization of Congress." Opp. at 6. Likewise, it says that the "Act must be read as a whole, and Congress should not be held to a simplistic and rigid standard." *Id.* at 10. In other words, the Tribe admits that nothing in the Act is a plain and express delegation, but claims that a plain English standard would be too "rigid and simplistic."

A. No Other Court Has Upheld a Delegation of Tribal Authority Unless the Language of a Congressional Act Is Plain

In every instance where a court has upheld a delegation of regulatory authority, it has been based on statutory language that, ***on its face***, makes Congress' intent to delegate plain. With one exception, this has been accomplished by language that specifically refers to patented fee land, specifically the term "notwithstanding the issuance of any patent." *See* Petition for Writ of Certiorari (Pet.) at 19-22. As noted, the one exception contained enough plain language to inform the public that such a delegation was present. *See* Pet. at 21 and discussion therein of *Arizona Public Service Company v. Environmental Protection Agency*, 211 F.3d 1280 (D.C. Cir. 2000), *cert. denied, sub nom. Michigan v. Environmental Protection Agency*, 532 U.S. 970 (2001). Yet Respondent argues that these examples provide no conflict, and in confusing the question of whether a delegation has occurred here with the question of whether such a delegation would be proper, suggests that other congressional delegations support the existence and propriety of this one. Opp. at 13-14.[2] Yet the fact remains that in every other effective delegation upheld by the lower federal courts, Congress made its intent plain, either by employing the "notwithstanding the issuance of any patent language" or the manner of *Arizona Public Service*.

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[2] The question of the propriety of any such delegation will be addressed last in this reply.

Respondents suggest that 18 U.S.C. § 1161, which forms the basis of the delegation in *United States v. Mazurie*, 419 U.S. 544 (1975), and *Rice v. Rehner*, 463 U.S. 713 (1983), proves its case because § 1161 contains "no specific words of delegation." Opp. at 14-16. Respondents are wrong. First of all, this "delegation" is in fact an exception to federal prosecution under 18 U.S.C. § 1154 for liquor sales in Indian country if state and tribal laws allow such sales. Second, there is no ambiguity with respect to § 1161's applicability on nonmember fee lands. Looking first to 18 U.S.C. § 1151, one sees "Indian country" defined to include nonmember fee lands (using the "notwithstanding the issuance of any patent" language). Next, § 1154 excludes "fee-patented lands in ***non-Indian*** communities." (Emphasis added.) Indian country, for the purposes of §§ 1154 and 1161, therefore, includes the fee patented land within ***Indian*** communities–in other words the broader definition consistent with § 1151. In other words, it is plain that § 1161 applies to nonmember fee property within Indian communities. In short, neither *Mazurie*, *Rice*, nor 18 U.S.C. § 1161 provides any basis for asserting that any court has upheld any delegation without that delegation being express in the plain language of the statute itself.[3]

The court of appeals' finding that the "ratification and confirmation" of the Tribal Constitution incorporated that document into the Settlement Act leads to the unavoidable conclusion that the constitution has been federalized. Respondents' claim to the contrary, Opp. at 7 n.5, cannot be squared with the Ninth Circuit's opinion which explicitly held that the Settlement Act's conferred federal authority on the Tribe by giving its constitution "the force of law," Pet. App. at

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[3] Respondents suggest that there is no conflict with prior judicial understandings of delegation because several prior federal appellate cases dealing with the Settlement Act are not in conflict with the decision below. Opp. at 13. Of course not, they had nothing to do with the question of delegation.

A-19, and that, in adopting the buffer-zone regulation, the Tribe "was acting pursuant to authority expressly granted by Congress." Pet. App. at A-27. The Tribe's action, in other words, constituted a manifestation of federal, not retained inherent tribal, power–thus allowing the court of appeals to avoid addressing applicability of inherent authority principles. *See* Pet. App. at A-36 n.12. Second, if the court had intended to conclude that the source of the regulation lay in inherent tribal authority and not in "express" authorization by Congress, it could have simply relied upon another en banc opinion handed down only months before–*United States v. Enas*, 255 F.3d 662 (9th Cir. 2001) (en banc), *cert. denied*, 122 S. Ct. 925 (2002)–where the Ninth Circuit effectively concluded that Congress possesses the power to overrule this Court's conclusion that such inherent authority has been lost. In sum, any suggestion that the decision below did not "federalize" the tribal council's action runs cannot be squared with what the court of appeals held or respondents themselves argued.[4]

Respondent argues that four statutes authorize "tribal authority over nonmembers that do not refer to the Indian Country definition." Opp. at 17. These statutes are completely inapposite. The Historic Preservation Act, 16 U.S.C. § 470a(d), is only an informational and planning statute; it provides for absolutely no delegation of regulatory jurisdiction over nonmember fee property. Furthermore, § 470a(d)(2)(D)(iii) refers specifically to property "neither owned by a member of the tribe nor held in trust." Thus, if this were a delegation, it would be an express one using plain language. The Indian Child Welfare Act, 25 U.S.C. § 1903, does not purport to delegate regulatory authority over nonmember fee land. In any event, 25 U.S.C. § 1903(10) does in fact define a reservation to be "Indian country" per 18 U.S.C. § 1151. The Indian Self-

[4] In fact, the Ninth Circuit declined to follow the suggestion by the United States that the Tribe was exercising inherent authority. Brief Amicus Curiae for the United States in Support of Appellees at 27.

Determination Act, 25 U.S.C. § 450, refers to local control over Indian education and federal services and has nothing to do with regulatory jurisdiction over nonmember fee land. Finally, the Curtis Act, ch. 517, 30 Stat. 495 (1898), deals with private land claims. It too is not a delegation to tribes of regulatory authority over nonmember fee lands. In short, the Tribe points to not a single example where there has been an express congressional delegation without the language of delegation being plain on the face of the statute.[5]

B. The Tribal Constitution Is Not an Express Delegation of Congressional Authority

After quoting the relevant constitutional provisions, Respondents recite the en banc panel's conclusory statement that the tribe can pass ordinances affecting nonmembers. Opp. at 5-6 (quoting Pet. App. at A-23). Respondents do not address the interpretation of the dissenters, the original panel, or petitioner that Article IX, Sec. 1(*l*), of the Tribal Constitution merely authorizes the tribe to regulate trade and consensual dealings. *See* Pet. at 17 (other than to say this interpretation is "not supported," Opp. at 6). With respect to Article III of the Tribal Constitution, Respondents say nothing at all other than to recite the provision. This nonresponse hardly removes the cloud of ambiguity surrounding the Tribal Constitution.

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[5] Respondents argue that Petitioner is asking for a rule that ignores the circumstance of "nonmembers located on tribal property" and a rule that "dissolves" reservations to the extent that non-Indian settlers purchase lands under the Allotment Acts. Opp. at 18. This is silly. Mrs. Bugenig does not address nonmembers located on tribal property because that would be another case. Nor is Mrs. Bugenig suggesting that reservations and Indian country do not include nonmember-owned fee property. She is simply pointing out that absent an express congressional delegation, or one of the two *Montana* exceptions, tribes lack jurisdiction over such lands.

C. The Legislative History Shows No Congressional Intent to Delegate

Lacking a clear statement in either the Settlement Act or the Tribal Constitution, Respondent resorts to the legislative history and lodges with this Court 74 pages of legislative history. If the Settlement Act were as unambiguous as Respondents insist, none of this would be necessary. There is not a line anywhere in the history where a single Senator, Representative, or Executive branch official says anything close to: "With the Settlement Act's ratification of the Tribal Constitution we are delegating federal authority to the tribe to regulate nonmember fee property."[6] The Settlement Act was to resolve a dispute that arose after the Hoopa Indians, who had at one time controlled all tribal timber receipts, declined to share those receipts with non-Hoopa Indians who had been lawfully settled upon the reservation. *See* Pet. at 11-14. Contrary to Respondents' suggestion, Opp. at 9 n.9, the *Short* cases had nothing to do with the regulation of allotted lands belonging to nonmembers. Respondents claim that the very idea that Congress failed to address the need for a statutory delegation is "nonsensical and unsupported." *Id.* at 11. Without any indication that Congress even thought about delegation, and

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[6] About all Respondent has to offer is the two sentences from two witnesses who were under the impression that the Settlement Act would allow the Tribe to zone and tax nonmember property. Hoopa Lodging (HL) at 95-96. Other witnesses spoke about the ability to zone and tax in general. HL at 96-99. Most likely, these statements reflect not a belief that Congress was delegating this authority, but an assumption that once the tribe got the reservation back under its exclusive control, it could do these things as a matter of course. Of course, these statements were made a year before *Brendale v. Confederated Tribes and Bands of Yakima Indian Nation*, 492 U.S. 408 (1989), confined tribal land use regulation over nonmember property to closed areas. Finally, of course, witness statements at subcommittee hearings are not very persuasive indicators of congressional intent.

because the issue of tribal regulation of nonmember fee property was ***not*** even an issue in the *Short* cases, it is perfectly sensible to conclude that Congress did not have delegation anywhere on its radar screen.

II

CONGRESS DID NOT HAVE THE AUTHORITY TO DELEGATE LAND USE REGULATION TO THE TRIBE

The question is whether Congress has the power to regulate patented property belonging to nonmember Indians when it has been held repeatedly that the federal government has been divested of all authority over these lands. *See* Pet. at 25-26. About all that Respondents can say about the authorities cited by Petitioner is that they are "ancient," but it cites no contrary authority. Opp. at 21. Respondents next suggest that Congress has power to protect surrounding tribal lands. That may be so, but there are limitations nevertheless. Just as Congress may not impose federal land use zoning on land outside the reservation, neither can it do so (on fee land) inside the reservation.[7] Finally, the recitation of various environmental laws where Congress has delegated its regulatory authority does not help Respondent. No one disputes here that Congress may regulate certain activities involving air, land, and water that affect the environment under the Commerce Clause or perhaps the Indian Commerce Clause. Nor is Petitioner disputing that Congress may be able to delegate this authority. But without a showing of authority under the Indian Commerce Clause for Congress to establish a religiously inspired buffer

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[7] Respondents' reference to *Delaware Tribal Business Committee v. Weeks*, 430 U.S. 73, 86 (1977), is unhelpful as it does not address the question at hand. Furthermore, while Congress may still regulate a reservation after allotments, that is not the same as saying it may regulate nonmember fee property as if it were trust property.

zone on nonmember fee property, Congress cannot delegate this authority to the Tribe.

CONCLUSION

The petition should be granted.

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Respectfully submitted,

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